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# Waiver of the Statutory Protection to the Confidential Relation of Physician and Patient

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## NOTE AND COMMENT

**WAIVER OF THE STATUTORY PROTECTION TO THE CONFIDENTIAL RELATION OF PHYSICIAN AND PATIENT.**—The subject of the disclosure by the physician upon the witness stand of confidential communications between himself and his patient has already received attention in this journal: 2 MICHIGAN LAW REVIEW, p. 687; 3 MICHIGAN LAW REVIEW, p. 311. The case of *Long v. Garey Investment Company*, decided by the Iowa Supreme Court December 15, 1906, may be briefly noticed, as it discusses a phase of the subject in regard to which the courts are not in entire harmony, namely, the waiver of the privilege that the statute confers.

The action in the above noted case was brought by the administrator of a deceased person to set aside conveyances made by deceased shortly before his death, on the ground among others of want of mental capacity to execute the conveyances. Among the witnesses by whom it was sought to show mental incapacity, was the physician who attended deceased just previous to his death and at the time of the execution of the conveyances. The defendant objected to this testimony on the ground that it was prohibited by the statute provision that "no practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any person, who obtains such infor-

mation by reason of his employment, minister of the gospel or priest of any denomination, shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline," but that "such prohibition shall not apply to cases where the party in whose favor the same is made waives the right conferred."

The testimony of the physician, the court held, was clearly within the inhibition of the statute, unless the privilege conferred by the statute was waived, and this the court held was done by the administrator when he called the physician as a witness. "We think," said the court, "that, as bearing on the issue of deceased's inability to execute the instruments, the administrator so far represents the deceased that he may waive the privilege of the patient by calling the physician to testify concerning communications made to him as such."

The conclusion of the court in this case was in accordance with its former decisions as to the effect of the statute. Thus in *Denning v. Butcher*, 91 Iowa, 425, it was held that, if called by the executor, the physician of a deceased person could give testimony as to his physical and mental condition at the time of the execution of the will, the executor having power to waive the statute. The reasoning was that as the deceased, if living, might waive the statute, his personal representative, after his death, ought to be allowed to do the same thing. In *Winters v. Winters*, 102 Iowa 53, 71 N. W. Rep. 184, 63 Am. St. Rep. 428, the court held that the protection of the statute could not be urged in a case where the dispute was as to the testamentary capacity of the testator, the parties to the contest being the devisee and heirs-at-law, each claiming under the deceased, for the reason that the proceedings were not adverse to the estate and that the interest of the deceased as well as of the estate was that the truth be ascertained. But it was suggested that "the court might well, in its discretion, prevent blackening the memory of the dead." "It is not very material to the result," said the court, "whether we say the heir or devisee may in the interest of the estate of the deceased, waive the privilege, or that the statute does not apply to a case where the proceedings are not adverse to the estate, and the interest of the deceased as well as his estate could only be the determination of the truth. In either event, we hold that in a dispute between the devisee or legal representative and the heirs-at-law, all claiming under the deceased, the attending physician may be called by either party." The same doctrine is declared in *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552. And the Supreme Court of Michigan in *Fraser v. Jennison*, 42 Mich. 209, in construing the statute of that state said: "The rule it establishes is one of privilege for the protection of the patient, and he may waive it if he sees fit; \* \* \* and what he may do in his lifetime those who represent him after his death may also do for the protection of the interests they claim under him."

But it has been held that the right to waive the privilege conferred by the statute is the personal right of the patient only, and that it cannot be exercised after his death by his representative or those interested in the

estate. Undoubtedly this conclusion is sometimes due to some extent to the fact that the wording of the statute seems to confine the privilege of waiver to the patient and to him alone. For example, the New York statute that was in force when the decisions cited below were rendered, required that the privilege be "expressly waived by the patient." It was held by the Court of Appeals of the state that the seal of secrecy would remain forever unless removed by the patient himself. "The purpose of the laws," said the court, "would be thwarted, and the policy intended to be promoted thereby would be defeated, if death removed the seal of secrecy from the communications and disclosures which a patient should make to his physician. \* \* \* Whenever the evidence comes within the purview of the statute, it is absolutely prohibited, and may be objected to by anyone unless it be waived by the person for whose benefit and protection the statutes were enacted. After one has gone to his grave, the living are not permitted to impair his fame and disgrace his memory by dragging to the light communications and disclosures made under the seal of the statutes. An executor or administrator does not represent the deceased for the purpose of making such a waiver. He represents him simply in reference to rights of property, and not in reference to those rights which pertain to the person and character of the testator." *Westover v. Aetna Life Ins. Co.*, 99 N. Y. 56, 52 Am. Rep. 1; *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770. But it is now provided by statute in New York that "a physician or surgeon may upon a trial or examination disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patient professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient when the provisions" of the statute protecting the patient from disclosures "have been expressly waived on such trial or examination by the personal representatives of the deceased patient, or if the validity of the last will and testament of such deceased patient is in question, by the executor or executors named in said will, or the surviving husband, widow, or any heir-at-law or any of the next of kin, of such deceased, or any other party in interest." It is further provided that the waiver must be made in open court, on the trial of the action or proceeding. *STOVER'S NEW YORK ANN. CODE* (6th Ed.), § 836. It has been held that the protection of the statute is sufficiently waived by the legal representative of the deceased person, if he calls the physician of the deceased to the stand in the trial of an action against the estate and asks him to disclose professional information falling within the inhibition of the statute, and that such representative need not, under such circumstances, specifically state his intention to waive the statute. *Holcomb v. Harris*, 166 N. Y. 257.

The Supreme Court of Indiana has excluded the testimony of a physician as to the physical and mental condition of a testator, when offered by the heir-at-law in contesting the will, the executor and devisees objecting, *Heuston v. Simpson*, 115 Ind. 62, but this court has held that the privilege of the statute might be waived by the administrator with the will annexed of the estate of a deceased person, upon the ground that such administrator was the representative of the deceased and was seeking to maintain the will.

*Morris v. Morris*, 119 Ind. 341. In California it has been held that an heir-at-law who is contesting with a devisee the probate of a will cannot waive for deceased the protection of the statute, as it cannot properly be said that the heir is representing the deceased in attempting to defeat the will. *In re Flint*, 100 Cal. 391, 34 Pac. Rep. 863.

H. B. H.